# STATE OF MICHIGAN

# COURT OF APPEALS

---

MARIE STRAMLER,

Plaintiff-Appellee,

v

ST. JOHN MEDICAL RESOURCE GROUP, a/k/a ST. JOHN MEDICAL CENTER MASONIC,

Defendant-Appellant.

---

UNPUBLISHED
February 28, 2003

No. 239509
Macomb Circuit Court
LC No. 00-004015-NO

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order denying its motion for summary disposition in this premises liability action. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court considers the pleadings, depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. Summary disposition is appropriate if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Plaintiff was an invitee in that she was on defendant's premises, which were held open for a commercial purpose. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000). An invitor has a duty to protect his invitees from an unreasonable risk of harm caused by a dangerous condition of his land that the invitor knows or should know the invitees will not discover. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty is not absolute. *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990). It does not extend to conditions from which an unreasonable risk of harm cannot be anticipated or to open and obvious dangers. *Id.*; *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

An open and obvious danger is one that is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, i.e., it is something that an average user with

ordinary intelligence would be able to discover upon casual inspection. *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992); *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). A landowner does not owe a duty to protect invitees from any harm presented by an open and obvious danger unless special aspects of the condition, i.e., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Bertrand, supra* at 614-617. However, "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 519; 629 NW2d 384 (2001).

That plaintiff did not see the defect before she fell is irrelevant because the test for an open and obvious danger is an objective one. *Hughes v PMG Building, Inc,* 227 Mich App 1, 11; 574 NW2d 691 (1997). If the defect creates a risk of harm solely because the plaintiff failed to notice it, the open and obvious doctrine eliminates liability if the plaintiff should have discovered it and realized its danger. *Bertrand, supra* at 611.

There is no indication that anything obstructed plaintiff's view of the sidewalk; she apparently failed to see the defect because she was not looking down at the ground. Common pavement defects do not create an unreasonable risk of harm or an unusually high likelihood of injury because an ordinarily prudent person would be able to see and avoid the defect and would be unlikely to suffer severe injury by tripping and falling to the ground. *Lugo, supra,* 464 Mich at 520, 523. Therefore, the circuit court erred in denying defendant's motion.

We reverse and remand with instructions to enter judgment for defendant on the ground that it is not liable for injuries resulting from an open and obvious danger. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Joel P. Hoekstra